

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BROOKS PERRY,	§	
	§	No. 297, 2009
Defendant Below-	§	
Appellant,	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware
	§	in and for Kent County
STATE OF DELAWARE,	§	Cr. ID Nos. 0705013040
	§	0705025098
Plaintiff Below-	§	0704021710
Appellee.	§	

Submitted: July 20, 2009

Decided: July 24, 2009

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

ORDER

This 24th day of July 2009, it appears to the Court that:

(1) On December 27, 2007, the defendant-appellant, Brooks Perry, pleaded guilty to three counts of Delivery of Cocaine. He was sentenced to 3 years of Level V incarceration, with diversion to boot camp. When Perry failed his boot camp physical, the Superior Court issued a modified sentencing order on February 20, 2009. The modified order provided that the remainder of Perry's Level V time was to be spent at the Delaware Psychiatric Center. Any appeal from the Superior Court's February 20,

2009 sentencing order should have been filed on or before March 23, 2009.¹

However, Perry did not file his *pro se* appeal until May 26, 2009.

(2) On May 27, 2009, the Clerk issued a notice to Perry to show cause why the appeal should not be dismissed as untimely filed. Perry filed a response to the notice to show cause. In the response, Perry states that he told his substitute public defender that he was dissatisfied with his modified sentence and that the substitute public defender stated that either he or Perry's original trial counsel would file an appeal. When he learned that an appeal was not filed, Perry filed his *pro se* appeal.

(3) On June 17, 2009, the Clerk requested Perry's original trial counsel to respond to Perry's statements. On June 18, 2009, Perry's original trial counsel filed his response, stating that substitute counsel never told him that Perry was dissatisfied with the modified sentence or that he wanted an appeal to be filed. Substitute counsel was copied on the response, but did not file a separate statement of his recollection. Perry filed a reply that essentially repeats the statements made in his original response to the notice to show cause. In its reply, the State acknowledges the apparent conflict between the recollections of Perry's original trial counsel and Perry, but, nevertheless, urges dismissal of the appeal.

¹ Supr. Ct. R. 6(a) (ii).

(4) We conclude, in the interest of justice and under the particular circumstances presented here, that this matter should be remanded to the Superior Court for a determination of whether Perry instructed substitute counsel to file an appeal.² If the Superior Court determines that Perry instructed his attorney to file an appeal, then its modified sentencing order should be vacated and Perry re-sentenced, with the assistance of counsel, so that a timely appeal may be filed.³

NOW, THEREFORE, IT IS ORDERED that this matter is hereby REMANDED to the Superior Court for further proceedings in accordance herewith. Jurisdiction is not retained.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

² *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000).

³ *Id.* at 478.